

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

FLAGSHIP WEST, LLC, et al.,	)	No. CV-F-02-5200 OWW/DLB
	)	
	)	ORDER CONTINUING ORAL
Plaintiffs,	)	ARGUMENT ON MOTIONS FOR
	)	ATTORNEYS' FEES FROM MONDAY,
vs.	)	OCTOBER 22, 2007 TO MONDAY,
	)	DECEMBER 3, 2007 AND
	)	DIRECTING PARTIES TO FILE
	)	SUPPLEMENTAL BRIEFS
EXCEL REALTY PARTNERS, L.P.,	)	
et al.,	)	
	)	
	)	
Defendants.	)	
	)	
	)	

Oral argument on the parties' respective motions for attorneys' fees is hereby continued from Monday, October 22, 2007 to Monday, December 3, 2007 so that the parties can file the supplemental briefs ordered herein.

Defendant New Plan Excel Realty Trust, Inc.'s motion for attorneys' fees is based primarily on New Plan's contention that it is a prevailing party because New Plan's motion for judgment as a matter of law pursuant to Rule 50(a), Federal Rules of Civil Procedure, was granted on November 26, 2003 based on Section

1 22.25 of the Ground Lease.

2 In their supplemental opposition to New Plan's motion for  
3 attorneys' fees, Plaintiffs refer to the "Order re: Post Trial  
4 Election of Remedies; Defendants' Claimed Rescission Waiver  
5 Clause; Defendants' Claimed Damage Limitation Clause" filed on  
6 November 19, 2004 (Doc. 353) (November 19, 2004 Order):

7 D. Rescission's Effect on Contractual  
8 Clauses.

9 Plaintiffs are correct in stating that  
10 rescission would void ordinary contractual  
11 clauses such as § 22.25. Once a contract is  
12 rescinded, all its provisions cease to have  
13 effect. See *Larsen v. Johannes*, 7 Cal.App.3d  
14 491, 501 (Cal.Ct.App.1970) (citing *Lemle v.*  
15 *Barry*, 181 Cal.1, 5 (Cal.1919)) ('When a  
16 contract is rescinded, it ceases to exist.  
17 If the action to rescind or an action based  
18 on an alleged rescission or abandonment is  
19 successful, the contract is forever ended and  
20 its covenants cannot thereafter be enforced  
21 by any action'). In an unpublished state  
22 court opinion, an analogous question was  
23 posed: 'The issue presented is elemental --  
24 may a defendant resist an action for  
25 rescission by relying on a liquidated damages  
26 provision of the contract the plaintiff is  
seeking to rescind? The answer is equally  
simple -- no.' *BTS, Inc. v. Sonitrol Corp.*  
*of Contra Costa*, ... 2002 WL 234889 (Cal.App.  
1 Dist., Feb. 19, 2002) ('rescinded contract  
is an extinguished contract meaning that it  
has ceased to exist and none of its  
provisions can be enforced by any party').

...

22 G. Conclusion

23 ... In the event rescission is elected, §  
24 22.25 cannot be enforced as rescission avoids  
25 enforceability of clauses of the Lease,  
26 including damage limitations.

1 Plaintiffs contend that the Court appears to have inadvertently  
2 overlooked this determination in entering Judgment for New Plan  
3 following the election of rescission and award of rescission and  
4 consequential damages. Plaintiffs assert that the Court has the  
5 inherent power to correct the Judgment pursuant to Rule 60(a),  
6 Federal Rules of Civil Procedure, and further assert that the  
7 election of rescission negates New Plan's contention that it is a  
8 prevailing party.

9 Defendants have not filed a brief addressing these specific  
10 contentions. Because resolution of these issues may be of  
11 critical importance to the resolution of the motions for  
12 attorneys' fees, Defendants are ordered to file a supplemental  
13 brief addressing these issues on or before Monday, November 5,  
14 2007. Plaintiffs' reply, if any, shall be filed on or before  
15 Monday, November 19, 2007.

16 IT IS SO ORDERED.

17 Dated: October 16, 2007

/s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE